

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL A. SCOTT, SR.,

Plaintiff,

v.

MAGGIE MILLER-STOUT, *et al.*,

Defendants.

CASE NO. C05-1950-RSL-JPD

REPORT AND
RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

This is a civil rights action brought under 42 U.S.C. § 1983. Plaintiff is a state prisoner who is currently incarcerated at the Airway Heights Corrections Center (“AHCC”) in Airway Heights, Washington. Plaintiff alleges in his second amended civil rights complaint that he was deprived of personal property by officials at two Washington State corrections facilities who were the custodians of that property. He also alleges that an employee at one of the facilities retaliated against him for filing a tort claim related to the lost property. Plaintiff identifies the following individuals as defendants in this action: Maggie Miller-Stout, Superintendent at AHCC; Robert Moore, Superintendent at the Monroe Correctional Complex (“MCC”); Pat Glebe, Assistant Superintendent at MCC; and, Tracy Daniel, a custody unit supervisor at MCC.

1 Defendants have now filed a motion to dismiss this action for failure to exhaust
2 administrative remedies. Plaintiff has filed a response to defendants' motion and defendants have
3 filed a reply brief in support of their motion. The briefing is now complete, and this matter is
4 ripe for review. This Court, having reviewed defendants' motion, and the balance of the record,
5 concludes that the motion to dismiss should be granted and this action should be dismissed,
6 without prejudice, for failure to exhaust administrative remedies.

7 DISCUSSION

8 At issue in this action are two boxes of plaintiff's property which were mailed from MCC
9 to plaintiff at AHCC on October 6, 2003, but which plaintiff contends he never received.
10 Plaintiff asserts that defendants Miller-Stout, Moore, and Glebe, in their role as superintendents at
11 AHCC and MCC, were the legal custodians of his personal property and that their failure to
12 ensure that the property was delivered to him following his transfer between institutions
13 constitutes a violation of his Fifth and Fourteenth Amendment rights. He further contends that
14 defendant Daniel failed to conduct a good faith investigation into the lost property and then
15 retaliated against plaintiff when plaintiff refused to withdraw a tort claim filed against defendant
16 Daniel with respect to the lost property.

17 Defendants argue in their motion to dismiss that this action should be dismissed because
18 plaintiff failed to exhaust his administrative remedies under 42 U.S.C. § 1997e(a). Section
19 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under
20 section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or
21 other correctional facility until such administrative remedies as are available are exhausted." 42
22 U.S.C. § 1997e(a). Section 1997e(a) requires *complete* exhaustion through any available process.
23 *See Porter v. Nussle* 534 U.S. 516, 524 (2002) ("All 'available' remedies must now be
24 exhausted."); *Booth v. Churner*, 532 U.S. 731, 735 (2001).

25 If administrative remedies have not been exhausted at the time an action is brought, it

1 must be dismissed without prejudice. *See McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir.
2 2002)(per curiam). “In deciding a motion to dismiss for a failure to exhaust nonjudicial
3 remedies, the court may look beyond the pleadings and decide disputed issues of fact. If the
4 district court concludes that the prisoner has not exhausted nonjudicial remedies, the proper
5 remedy is dismissal of the claim without prejudice.” *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th
6 Cir. 2003)(citations and footnote omitted).

7 Defendants assert in their motion to dismiss that the Washington Department of
8 Corrections (“DOC”) has an established administrative grievance process, but that plaintiff failed
9 to complete that process with respect to his property claim. Defendants have offered the
10 declaration of Devon Schrum, DOC Grievance Program Manager, to support this assertion. Mr.
11 Schrum identifies in his declaration the types of issues which are grievable through the
12 Washington Offender Grievance Program. In addition, he describes the four levels of review
13 which comprise the grievance procedure. Mr. Schrum indicates that his review of the DOC’s
14 official grievance records revealed that plaintiff filed two grievances concerning lost property,
15 but that he failed to complete the grievance process on either occasion. The first grievance by
16 plaintiff with respect to his lost property, submitted at AHCC on December 9, 2003, was returned
17 to plaintiff for re-writing to include required information. Plaintiff apparently elected not to re-
18 write that grievance. Plaintiff subsequently submitted a second grievance related to his lost
19 property to the AHCC grievance coordinator. That grievance was denied at level one of the
20 grievance process and plaintiff pursued the grievance no further.

21 Plaintiff, in his response to defendants’ motion to dismiss, appears to concede that he did
22 not pursue the grievance process to its conclusion with respect to his property claim. However,
23 he attributes this to the fact that he was advised in the response to his second grievance that
24 further inquiries regarding his lost property should be addressed to MCC. Plaintiff appears to
25 indicate that he thereafter had some sort of informal communication with MCC regarding the lost

1 property, but he made not effort to pursue the grievance process with MCC. Plaintiff states that
2 he elected instead to pursue his administrative remedies by way of a tort claim filed with the
3 Department of Financial Management in Olympia.

4 As noted above, § 1997e(a) requires *complete* exhaustion through any *available* process.
5 The institutional grievance process was available to plaintiff yet he failed to see that process
6 through to its conclusion. Instead, plaintiff elected to bypass that process in favor of filing a state
7 tort claim. Plaintiff offers no authority to support that proposition that the filing of a state tort
8 claim in lieu of completing the administrative grievance process satisfies the exhaustion
9 requirement, and this Court is aware of no such authority. Accordingly, this Court concludes that
10 plaintiff failed to exhaust his property claim.

11 Plaintiff also claims that he was transferred to the MCC Special Offenders Unit (“SOU”),
12 a prison unit for mentally ill offenders, in retaliation for his refusal to withdraw his state tort
13 claim. Defendants do not address this claim in their motion to dismiss. It is not clear whether
14 this was an intentional omission or merely an oversight. Regardless, it appears from the record
15 before this Court that plaintiff has also failed to exhaust available remedies with respect to his
16 retaliation claim. Documents submitted by plaintiff with his first amended complaint reflect that
17 plaintiff grieved his transfer to the SOU. In the grievance response, plaintiff was advised that the
18 transfer constituted a classification decision and was therefore not grievable. He was further
19 advised that he could appeal the transfer to the superintendent of the sending facility. Nothing in
20 the record suggests that plaintiff ever pursued such an appeal. This Court must therefore
21 conclude that plaintiff failed to properly exhaust his administrative remedies with respect to his
22 retaliation claim as well.

23 CONCLUSION

24 Based on the foregoing, this Court recommends that defendants’ motion to dismiss be
25 granted and that plaintiff’s second amended complaint, and this action, be dismissed without

1 prejudice. A proposed order accompanies this Report and Recommendation.

2 DATED this 3rd day of November, 2006.

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4 JAMES P. DONOHUE
5 United States Magistrate Judge
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